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No. 08-840

Supreme Court, U.S.
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In The

Supreme Court of the United States

HOLLIS WAYNE FINCHER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The Eighth Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. A law-abiding citizen with a lawful purpose is entitled to protection under the Second Amendment of the United States Constitution for possession of specially regulated firearms if a fact finder agrees that the firearms are typically possessed by other law-abiding citizens with similar purposes, and are not dangerous or unusual in the circumstances. *District of Columbia v. Heller*, ___ U.S. ___, 128 S.Ct. 2783 (2008).

2. A law-abiding citizen with a lawful purpose is entitled to the Second Amendment privilege even if he is not a member of a government-sponsored military organization. *Id.*

PARTIES TO THE PROCEEDING

There are no parties to the proceeding who are not listed in the caption.

CORPORATE DISCLOSURE

None of the parties are a corporation.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
CORPORATE DISCLOSURE	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
CITATIONS FOR OPINIONS BELOW	1
BASIS FOR JURISDICTION IN THIS COURT	1
CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE	1
STATEMENT OF THE CASE	4
REASONS FOR GRANTING *CERTIORARI*	7
1. *HELLER* REQUIRES A SPECIFIC CONTEXTUAL ANALYSIS OF WHETHER FIREARMS ARE "DANGEROUS AND UNUSUAL," WHICH THE LOWER COURTS HAVE FAILED TO APPLY	8
2. THE NEED FOR *CERTIORARI* REVIEW IS EMPHASIZED BY SIMILAR ERROR COMMITTED BY OTHER COURTS	13
3. THE COURT OF APPEALS' OPINION IS IN DIRECT AND IRRECONCILABLE CONFLICT WITH *HELLER* BECAUSE IT ALLOWS SECOND AMENDMENT PROTECTION FOR ONLY MEMBERS OF GOVERNMENT-SPONSORED MILITIA	17
CONCLUSION	21

TABLE OF CONTENTS – Continued

Page

APPENDIX:

Opinion of United States Court of Appeals for the Eighth Circuit affirming District Court conviction of the petitioner and vacating order revoking the petitioner's *in forma pauperis* status A1

Judgment Opinion of United States Court of Appeals for the Eighth Circuit affirming District Court conviction of the petitioner and vacating order revoking the petitioner's *in forma pauperis* status A23

Order of United States District Court for the Western District of Arkansas, Fayetteville Division, filed July 7, 2008 ..... A25

Order of United States Court of Appeals for the Eighth Circuit affirming District Court denying rehearing *en banc* and denying rehearing by the panel A49

TABLE OF AUTHORITIES

Page

CASES

Bourjaily v. United States, 483 U.S. 171, 107 S.Ct. 2775 (1987) 21

District of Columbia v. Heller, ___ U.S. ___, 128 S.Ct. 2783 (2008) ..... *passim*

Durns v. United States, 562 F.2d 542 (8th Cir. 1977), cert. denied, 434 U.S. 959, 98 S.Ct. 490, 54 L.Ed.2d 319 (1977) 21

Elder v. Holloway, 510 U.S. 510 (1994) 17

Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942), superseded by statute on other grounds, *Bourjaily v. United 21States,* 483 U.S. 171, 107 S.Ct. 2775 (1987) 21

Hamblen v. U.S., Case No. 3:08-1034, 2008 WL 5136586 (M.D. Tenn., December 5, 2008) 8, 13

Isaacs v. United States, 301 F.2d 706 (8th Cir. 1962), cert. denied, 371 U.S. 818, 83 S.Ct. 32, 9 L.Ed.2d 58 (1962) 21

Salter v. Roy, Case No. 5:08-CV-145, 2008 WL 4588629 (E.D. Tex., October 6, 2008) 8, 14

United States v. Artez, 290 Fed.Appx. 203 (10th Cir. 2008) 15

United States v. Perkins, Case No. 4:08CR3064, 2008 WL 4372821 (D.Neb., September 23, 2008) 8, 14, 15

TABLE OF AUTHORITIES – Continued

Page

United States v. Fincher, 538 F.3d 868 (8th Cir. 2008) 1, 14, 15, 18

United States v. Miller, 307 U.S. 174 (1939) ..... *passim*

United States v. Hale, 978 F.2d 1016 (8th Cir. 1992) 5, 18, 19, 20

Wilkinson v. United States, 365 U.S. 399 (1961) 17

OTHER AUTHORITIES

AUTOBIOGRAHPHY OF BENJAMIN FRANKLIN, 182-83 (Yale 2d ed. 2003) 17

CITATIONS FOR OPINIONS BELOW

The Opinion of the Court of Appeals (Appendix A1) is reported at 538 F.3d 868 (8th Cir. 2008). The decision of the district court denying IFP status (not at issue here) (Appendix A25) and the order of the Court of Appeals denying the petition for rehearing and for the suggestion for hearing *en banc* (Appendix A49) were not reported.

BASIS FOR JURISDICTION IN THIS COURT

Judgment was entered by the district court on June 26, 2007. This case was appealed to the 10th Circuit on June 27, 2007. The Court of Appeals issued its Opinion on August 13, 2008. the petitioner's petition for rehearing and for rehearing *en banc*. This Court therefore has jurisdiction pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The underlying criminal action was prosecuted by the respondent under 18 U.S.C. §§922(o) and 924(a)(2), and 26 U.S.C. §§5841, 5861(d) and 5871.

18 U.S.C. §922(o), "Unlawful acts," reads as follows:

(o)(1) Except as provided in paragraph (2), it shall be unlawful for any person to transfer or possess a machine gun . . .

18 U.S.C.A. §924(a)(2), "Penalties," reads:

(A) knowingly makes any false statement or representation with respect to the information required by this chapter to be kept in the records of a person licensed under this chapter or in applying for any license or exemption or relief from disability under the provisions of this chapter;

* * *

(2) Whoever knowingly violates subsection (a)(6), (d), (g), (h), (i), (j), or (o) of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

26 U.S.C.A. §5841, "Registration of firearms," states:

Part I. General Provisions.

(a) Central registry. The Secretary shall maintain a central registry of all firearms in the United States which are not in the possession or under the control of the United States. This registry shall be known as the National Firearms Registration and Transfer Record. The registry shall include

(1) identification of the firearm;

(2) date of registration; and

(3) identification and address of person entitled to possession of the firearm.

(b) By whom registered. Each manufacturer, importer, and maker shall register each firearm he manufactures, imports, or makes. Each firearm transferred shall be registered to the transferee by the transferor.

(c) How registered. Each manufacturer shall notify the Secretary of the manufacture of a firearm in such manner as may by regulations be prescribed and such notification shall effect the registration of the firearm required by this section. Each importer, maker, and transferor of a firearm shall, prior to importing, making, or transferring a firearm, obtain authorization in such manner as required by this chapter or regulations issued thereunder to import, make, or transfer the firearm, and such authorization shall effect the registration of the firearm required by this section.

(d) Firearms registered on effective date of this Act. A person shown as possessing a firearm by the records maintained by the Secretary pursuant to the National Firearms Act in force on the day immediately prior to the effective date of the National Firearms Act of 1968 shall be considered to have registered under this section the firearms in his possession which are disclosed by that record as being in his possession.

(e) Proof of registration. A person possessing a firearm registered as required by this

> section shall retain proof of registration which shall be made available to the Secretary upon request.
>
> 26 U.S.C.A. §5861, "Prohibited Acts," reads:
>
> It shall be unlawful for any person (d) to receive or possess a firearm which is not registered to him in the National Firearms Registration and Transfer Record.
>
> 26 U.S.C.A. § 5871, "Penalties," states:
>
> Any person who violates or fails to comply with any provision of this chapter shall, upon conviction, be fined not more than $10,000, or be imprisoned not more than ten years, or both.

The petitioner alleges that the respondent violated his rights under the Second Amendment to the United States Constitution. The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

STATEMENT OF THE CASE

Fincher was arrested by the respondent, United States of America ("the Government"), on November 9, 2006, on a charge of possession of a machine gun in violation of 18 U.S.C. §922(o), which indictment was later amended to include possession of a short-barreled shotgun. Complaint (Dkt. No. 1), Indictment

(Dkt. No. 8), and Amended Indictment (Dkt. No. 30).[1] The district court had jurisdiction of the matter pursuant to 18 U.S.C. §3231. Pretrial, the Government filed a motion *in limine* seeking to limit the evidence that could be presented to the jury at trial. Mot. in Limine (Dkt. No. 19).[2] Specifically it sought to preclude Fincher from arguing certain legal elements to the jury without court approval via a proper jury instruction. *Id.*, p. 1. Fincher responded in writing, stating he intended to offer evidence in support of his Second Amendment defense under the U.S. Supreme Court case of *United States v. Miller*, 307 U.S. 174, 178 (1939) and the Eighth Circuit Court of Appeals case of *United States v. Hale*, 978 F.2d 1016, 1020 (8th Cir. 1992). Resp. to Mot. in Limine (Dkt. No. 29).[3] At hearing on the issue, the trial court stated:

> The more specific proposition – and I've already addressed the one, I think – with the language in *Miller*, that if it is the case that a ***Defendant*** is asserting – and I think that's what I'm hearing here – ***is asserting that the possession in question should not be criminalized by reason of the Second Amendment through the concept that it has some reasonable relationship to the preservation or efficiency of a well-regulated militia***. I think that if there is

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[1] Record, *U.S. v. Hollis Wayne Fincher*, U.S. District Court, Fayetteville Division, Case No. 5:06M5048-001.

[2] *Id.*

[3] *Id.*

> evidence – evidence, now – to be presented to a jury to decide whether that's fact or not, then ***it will be permissible*** for the Defendant to present that, but not through attorneys' arguments or otherwise.

Tr. of Hearing, Jan. 9, 2007, 76:18-77:3 (emphasis added), ER2 to ER3.[4]

Fincher's case was tried before a jury on January 12, 2007. At that time, he tried to offer the testimony the trial court had said "would be permissible." Judge Hendren, however, reversed himself, and refused to allow the evidence. *Id.*, 489:19-22, ER4. Fincher was then convicted of both charges of a two-count Indictment, possession of a machine gun, in violation of 18 U.S.C. §§922(o) and 924(a)(2), and possession of a short-barreled shotgun not registered, in violation of 26 U.S.C. §§5841, 5861(d) and 5871. Jury Verdict (Dkt. No. 35).[5] The jury did not get to consider any evidence which, if believed, would have offered Fincher refuge under the Second Amendment.

Judgment was entered below on June 26, 2007. Notice of appeal was timely filed on the conviction on June 27, 2007. The district court later entered an order, on July 27, 2007, revoking Fincher's *in forma pauperis* ("IFP") status, and directing him to reimburse the

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[4] Record, *U.S. v. Hollis Wayne Fincher*, Appeal No. 07-2514/2888, In the U.S. Court of Appeals for the Eighth Circuit.

[5] Record, *U.S. v. Hollis Wayne Fincher*, Case No. 5:06M5048-001,U.S. District Court, Fayetteville Division.

respondent United States of America ("the Government") for fees paid to his appointed counsel. Notice of appeal of this order was timely filed on August 10, 2007. The Court of Appeals therefore had appellate jurisdiction pursuant to Rule 4(b)(1)(A), Fed. R. Civ. P., and 28 U.S.C. §1291.

The Court of Appeals for the Eighth Circuit properly vacated the trial court's IFP order and remanded for further proceedings, but affirmed the conviction at issue herein, in a published Opinion filed on August 13, 2008. Appendix A1. Thereafter, on September 25, 2008, the Court of Appeals denied the petitioner's petition for rehearing and rejected the petitioner's suggestion for rehearing *en banc*. Appendix A49.

REASONS FOR GRANTING *CERTIORARI*

The Court should grant the petition because the Court of Appeals clearly applied two erroneous rules of law. First, it erred by applying the holding of *D.C. v. Heller* without any analysis of whether the firearms at issue are in fact "dangerous and unusual" in the context of the case. Second it applied the wrong rule in holding that the Second Amendment applies only to members of government-sponsored militia, and not, as was the successful respondent in *Heller*, to members of the public in general. Furthermore, the Court of Appeals' decision in this case is the first reported case from an appellate court to apply *Heller*.

It therefore has been and will, despite the errors of law, continue to be cited by other courts as precedent. *Hamblen v. United States*, Case No. 3:08-1034, 2008 WL 5136586 (M.D. Tenn., December 5, 2008); *Salter v. Roy*, Case No. 5:08-CV-145, 2008 WL 4588629 (E.D. Tex., October 6, 2008); *United States v. Perkins*, Case No. 4:08CR3064, 2008 WL 4372821 (D.Neb., September 23, 2008). *Certiorari* is therefore vital to preserve both the central holding of *Heller*, as well as its underlying principles.

1. *HELLER* REQUIRES A SPECIFIC CONTEXTUAL ANALYSIS OF WHETHER FIREARMS ARE "DANGEROUS AND UNUSUAL," WHICH THE LOWER COURTS HAVE FAILED TO APPLY.

The first error of the Court of Appeals was its holding that the petitioner's weapons were dangerous and unusual, while ignoring (and preventing the petitioner from presenting to the jury), the context in which he held his weapons. This, in spite of the fact the district court made an uncontested factual finding that the petitioner was a law-abiding citizen with a lawful and even patriotic purpose. As the court found: "No one questions that. I certainly don't." ER147. Nevertheless, the Court of Appeals, without upsetting this finding, held that the unregistered weapons the petitioner was convicted of possessing were "dangerous and unusual" as a matter of law, and, therefore, the petitioner's possession was not protected by the Second Amendment. As stated, courts across jurisdictions have

followed a similar misapplication of *Heller* where, as here, the only criminal activity alleged is the unlicensed or unregistered possession of specially regulated firearms (such as short-barreled shotguns or machine guns). The erroneous rule of law is that machine guns and short-barreled shotguns are always, regardless of context, "dangerous and unusual," and therefore their possession is always, as a matter of law, ineligible for Second Amendment protection. The Court should therefore grant *certiorari* to prevent the error from becoming repeated and compounded by other courts nationwide.

Under *Heller*, where the issue involved the level of regulation that could burden the possession of a firearm by a law-abiding citizen, courts should consider whether the defendant is an otherwise law-abiding citizen, and whether the possession at issue bears a reasonable relationship to the lawful purpose for which the weapon is held. *Heller*, ___ U.S. ___, 128 S.Ct. at 2815. In *Heller,* the facts involved home rather than, as here, common defense. In *obiter dicta*, the *Heller* decision also noted that its analysis would likely not apply to "weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns," *id.* at 2815-16, or to other weapons that are "dangerous and unusual." *Id.* at 2816-17. But the phrase "weapons not typically possessed by law-abiding citizens for lawful purposes," and a correct conception of "dangerous and unusual," like so much else, depends entirely on

context. The Court of Appeals erred in failing to even consider context.

Examples of how context matters are not hard to imagine. It is surely not typical for a law-abiding citizen to possess a short-barreled shotgun to pursue upland game birds. Yet, in the context of policing of an urban environment, a law-abiding police officer may well be issued a short-barreled shotgun for his/her patrol car because, in the close quarters of a vehicle interior, it is easier to store, access, and use than a full-length weapon. Likewise, it may be dangerous and unusual for a sportsman to hunt deer with a machine gun, but not dangerous or unusual at all for a citizen-soldier serving in the National Guard to perform qualification tests with a Squad Automatic Weapon at his local armory's rifle range. Thus, context is always pivotal, and under *Heller*, it always deserves a fully reasoned analysis. According to this reading of *Heller,* the Second Amendment should protect an otherwise law-abiding citizen with an otherwise lawful purpose from prosecution for firearms possession offenses, so long as a finder of fact agrees that the weapon in question is (a) possessed by a law-abiding citizen for (b) a lawful purpose, and is not (c) "dangerous and unusual" in the context at issue.

The petitioner is fully mindful of and – indeed reliant upon – the language in *Heller* stating that the Second Amendment does not protect weapons "not typically possessed by law-abiding citizens for lawful purposes." *Heller*, 128 S.Ct. at 2815-16. But, the

petitioner, like the litigant in *Heller*, is as the district court found, an otherwise law-abiding citizen who intended his weapons only for purposes of lawful public service. ER147. The sole crime the Government contends the petitioner committed is possession of the arms without appropriate federal licensing. In *Heller*, the lawful purpose was home defense. Despite the availability of police protection, and despite the dangers to the public and the homeowners inherent in storing assembled and operational firearms in a home, the relationship between the arms and their purpose established Mr. Heller's individual Second Amendment right. With the petitioner here, as the district court ruled, the lawful purpose was the common defense. *Id.* Indeed, the only evidence in this case is that the Washington County Militia ("WCM"), of which the petitioner was a member in good standing, chose the Browning machine gun as one of its three standard arms – not because it intended members to use the guns for some unlawful purpose – but because their use furthered the WCM's lawful mission of contributing "to the common defense," *Miller*, 307 U.S. at 178, 59 S.Ct. at 818. The Browning machine gun was chosen as a "battle-proven" weapon of "standard military utility," (ER42), which is easy and cheap to produce and maintain, and which accepts standard ammunition that is inexpensive and readily available. ER42 to ER45. Consequently, despite the availability of police and military protection, and despite the dangers inherent in possessing the weapons at issue, the jury ought to be able to decide whether the relationship between the weapons and

the WCM's purpose, in full consideration of the evidence regarding its methods in serving that purpose, is sufficient to establish a Second Amendment right.

This analysis is supported by the fact the petitioner has never argued that absent his membership in the WCM, or its selection of the subject weapons as two of its three standard arms, that he would otherwise be privileged by the Second Amendment to possess them for recreational, cultural, or any other purposes of his subjective desire. He likewise does not argue that the Second Amendment reaches crew-served weapons such as, *e.g.*, artillery and tanks, those not used as personal arms by individual infantrymen similar to the citizen-soldiery of historical colonial militias. *See*, *Heller*, 128 S.Ct. at 2815-16. It reaches only those personal weapons which further the WCM's mission of contributing to the common defense as a well-ordered, publicly recognized and adequately trained company of militiamen. In this particular context, reasonable minds could differ over whether short-barreled shotguns and light machine guns are "safe and usual." Since the point is arguable as a matter of fact, it is therefore for a jury to decide whether the relationship of the petitioner's weapons to the WCM's purpose should qualify its members for Second Amendment protection.

Ultimately, it is the reasonableness of the relationship between the petitioner's possession of the arms in question, on the one hand, with the preservation and efficiency of the WCM as a militia organization, on the other, which affords him the Second Amendment

privilege. This is the narrow, factually predicated test promulgated in *Miller*, and nothing in *Heller* undermines its continued vitality in the context of a bona-fide militia. The Court of Appeals' decision, however, fails to recognize and apply this rule of law, and therefore, as the lead appellate court case to apply *Heller*, it ought to be subject to correction on *certiorari*.

2. THE NEED FOR *CERTIORARI* REVIEW IS EMPHASIZED BY SIMILAR ERROR COMMITTED BY OTHER COURTS.

Even though it was filed only in August 2008, the Court of Appeals' erroneous rule of law has already been cited in several cases. For example, in *Hamblen*, 2008 WL 5136586 (M.D. Tenn., December 5, 2008), a case involving no crime but the possession of unregistered weapons, a U.S. District Court espoused:

> The conclusion that the *Heller* Court did not extend Second Amendment protection to machine guns, in particular, is supported by the lower federal courts that have addressed the issue. In *United States v. Fincher*, 538 F.3d 868, 873-74 (8th Cir.2008), the Eighth Circuit held that the defendant's possession of a machine gun was not protected by the Second Amendment under *Heller*: "Machine guns are not in common use by law-abiding citizens for lawful purposes and therefore fall

> within the category of dangerous and unusual weapons that the government can prohibit for individual use."

Id. at *4.

Another such case is *Salter,* 2008 WL 4588629, *2, where, in the context of a possession violation, the district court held: "The Supreme Court [in *Heller*] did not find that possession of machine guns is also protected by the Second Amendment." (citing *United States v. Fincher*, 538 F.3d 868 (8th Cir. 2008).) In *United States v. Perkins* a similar all-encompassing – and wrong – ruling was made:

> The Eighth Circuit Court of Appeals recently rejected such a broad attack in a case charging the unlawful possession of a machine gun and an unregistered short-barreled shotgun. It stated:
>
> > Fincher's possession of firearms is, as a matter of law, not reasonably related to a well regulated militia and is thus not protected by the Second Amendment.
>
> In reaching this conclusion, we have taken into account the Supreme Court's recent decision in *District of Columbia v. Heller*, ___ U.S. ___, 128 S.Ct. 2783 (2008), in which the Court held that the District of Columbia's complete prohibition on the possession of usable handguns in one's home violated the Second Amendment. *Id.* at 2817-18. In holding that the Second Amendment guarantees "the individual right to possess and carry

> weapons in case of confrontation," *id.* at 2797, the Court also stated that the right to possess firearms is not beyond the reach of all government regulation. *Id.* at 2799, 2816 ("Like most rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.").

United States v. Perkins, Case No. 4:08CR3064, 2008 WL 4372821, *3 (D.Neb., September 23, 2008). The *Perkins* court then compounded its error: "Machine guns are not in common use by law-abiding citizens for lawful purposes and therefore fall within the category of dangerous and unusual weapons that the government can prohibit for individual use." *Id.* at *4 (quoting *Fincher*). The Court of Appeals for the Tenth Circuit, in an unreported case, fell into similar error recently when it quoted *Heller* thus:

> Regardless, the Supreme Court in *Heller* explicitly stated that "the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns." 128 S.Ct. at 2815-16.

United States v. Artez, 290 Fed.Appx. 203, 208 (10th Cir. 2008).

This assertion of fact, that such weapons are "not typically possessed by law-abiding citizens for lawful

purposes," is being treated by the lower courts as a rule of law. But as a matter of fact, it is simply wrong. It all depends on context. Machine guns and short-barreled shotguns are and have always been typically possessed by law-abiding citizens for lawful purposes. Obviously there are millions of such arms in the hands of state National Guard and the federal military.[6] As for civilians, federal, state, and local law enforcement has always armed itself well and thoroughly with fully automatic weapons and combat shotguns of short length to fit handily inside police vehicles.[7] The members of all these organizations are citizens, and they hold their arms – as the petitioner in this case did – for a lawful and honorable purpose. The key, as in *Heller*, is the intended use of the weapon, not its nature. The law-abiding members of the National Guard, military, and police use their weapons to ensure common defense and public safety. Here, the district court found the petitioner to harbor the exact same purpose. The petitioner and others like him are not, and should not be, hunted-down and prosecuted as criminals. They set examples of public service that should be protected under the Second Amendment.

The lower courts are clearly following an *ipso facto* rather than contextual analysis. When lower courts are laboring, as here, under a mis-construction

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[6] *E.g.*, http://en.wikipedia.org/wiki/Sawed-off_shotgun#Police_and_military_use.

[7] *Id.*

of this Court's case law – where they are applying the wrong rule of law – a petition for *certiorari* should be granted. *Elder v. Holloway*, 510 U.S. 510, 515 (1994); *Wilkinson v. United States*, 365 U.S. 399, 400 (1961). This should be particularly true if the misconstruction is set forth in a reported decision, such as in the petitioner's case, which has been, and is likely to be, followed as persuasive precedent by other district and appellate courts from other circuits.

3. THE COURT OF APPEALS' OPINION IS IN DIRECT AND IRRECONCILABLE CONFLICT WITH *HELLER* BECAUSE IT ALLOWS SECOND AMENDMENT PROTECTION FOR ONLY MEMBERS OF GOVERNMENT-SPONSORED MILITIA.

The possession of a machine gun and a short-barreled shotgun by the petitioner, an otherwise law-abiding citizen, was related solely to his lawful purpose of serving in a privately-constituted militia organization, the Washington County Militia ("WCM").[8] The Court of Appeals correctly stated that the WCM is "not a secretive organization" and has held regular meetings and training sessions for its

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[8] Private militia incorporated for a public purpose are not unprecedented in U.S. history by any means. For example Benjamin Franklin, who later participated in the Constitutional Convention, organized a private militia for the defense of Pennsylvania. *See*, AUTOBIOGRAHPHY OF BENJAMIN FRANKLIN, 182-83 (Yale 2d ed. 2003).

members. *United States v. Fincher*, 538 F.3d 868, 872 (8th Cir. 2008); *see*, A3. It even informed Washington County, Arkansas, and United States governmental authorities, in writing, of its existence, activities, and purposes, and that none of these authorities had objected to such activities or found them to be dangerous and unusual in their context. *Id.*; *see*, A3-A4. Indeed, the local sheriff even inspected WCM's facility and weapons, including machine guns, on more than one occasion. *Id.*; A4; ER11, p. 432-36. The petitioner is entitled to protection under the Second Amendment because his keeping and bearing of military-grade small-arms is related solely (not just reasonably) to his service in a regularly trained, if non-governmental, militia open to and participated in it by the local public. The Court of Appeals' Opinion that the petitioner, and other law-abiding people with similarly lawful aims, is not entitled to the Second Amendment privilege is based on a complete misconception of the necessary holding of *Heller*.

In its decision, the Court of Appeals affirmed that possession of a short-barreled shotgun or a machine gun is privileged under the Second Amendment if such possession "bears a reasonable relationship to a well regulated militia." *Fincher*, 538 F.3d at 872 (citing *United States v. Hale*, 978 F.2d 1016, 1020 (8th Cir. 1992) and other precedent). It then held, however, that as a matter of law, "membership in a ***non-governmental*** military organization ***is not sufficient*** to satisfy the 'reasonable relationship' test." *Id.* at 873 (emphasis added). Under this holding, regardless of

how well-equipped, trained, supervised, or otherwise "regulated" a militia unit may be, unless it is governmentally sponsored, its members enjoy no Second Amendment privileges. This, simply put, is in direct conflict and irreconcilable with *Heller*.

Prior to *Heller*, the Court's last Second Amendment decision was *Miller*. *See*, *United States v. Miller*, 307 U.S. 174, 178 (1939). In *Miller*, the test was whether "some reasonable relationship" existed between (a) the possession of an otherwise restricted firearm and (b) the preservation of a "well-regulated militia." To satisfy this test, *Miller* required that evidence establish the arm in controversy to consist either of "ordinary military equipment," or that its use "could contribute to the common defense." *Id.* In *Hale* and subsequent cases, the Eighth Circuit Court of Appeals held that arms in the possession of members of "non-governmental military organizations" could never, as a matter of law, satisfy a Second Amendment test. *See*, *Hale*, 978 F.2d at 1020. This is the same rule the Court of Appeals applied in the petitioner's case.

Yet, in *Heller*, the successful litigant was clearly not a member of any military organization, governmental or otherwise. Rather, Mr. Heller claimed Second Amendment privileges solely as a private citizen unaffiliated with any military entity. *E.g.*, *Heller*, 128 S.Ct. at 2788. Thus, *Hale*'s narrowing of the Second Amendment privilege to only members of governmental military units has now, because of *Heller*, been forever swept aside. The Court of Appeals'

reliance on *Hale* is flatly contradictory of *Heller*, and should be subject to review on *certiorari* by this Court.

This change in the law is key because of the relief for which the petitioner asked on appeal. He sought reversal of his conviction and remand with instructions, per *Miller*, for the jury to decide whether the particulars of his possession of a machine gun and a short-barreled shotgun had "***some*** reasonable relationship to the preservation ***or*** efficiency of a well regulated militia." *Miller*, 307 U.S. at 178 (emphasis added). As now made clear by *Heller*, this factual inquiry does not depend on the petitioner's membership in a military organization, governmental or otherwise. It turns on whether, given the evidence, the petitioner's possession of the statutorily prohibited arms can be considered "ordinary military equipment ***or*** that [their] use could contribute to the common defense." *Miller*, 307 U.S. at 178 (emphasis on "or" added). Thus, if the firearms are either "ordinary military equipment," or their use "could contribute to the common defense," the petitioner's possession of them, so long as it is in the context of his service in the WCM, is privileged. Yet, the Court of Appeals decided this analysis could be considered only if the petitioner had claimed to be a member of a governmental military organization.

This is not the law. *Heller* makes it clear that governmental affiliation is not a prerequisite for Second Amendment privileges. In this case, reasonable minds could differ on whether the *Miller* test is

satisfied: does the petitioner's evidence establish "some relationship" between his arms and the preservation and efficiency of the WCM as a "well-regulated militia"? *Miller*, 307 U.S. at 178, 59 S.Ct. at 818. It is therefore a question for a jury to decide. *E.g.*, *Isaacs v. United States*, 301 F.2d 706, 726-27 (8th Cir. 1962), cert. denied, 371 U.S. 818, 83 S.Ct. 32, 9 L.Ed.2d 58 (1962); *Durns v. United States*, 562 F.2d 542, 545-46 (8th Cir. 1977), cert. denied, 434 U.S. 959, 98 S.Ct. 490, 54 L.Ed.2d 319 (1977); *Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 86 L.Ed. 680 (1942), superseded by statute on other grounds; and *Bourjaily v. United States*, 483 U.S. 171, 107 S.Ct. 2775 (1987).

Certiorari should therefore be granted, the conviction should be vacated, and the case should be remanded to the district court for a new trial.

CONCLUSION

The Eighth Circuit promulgated two rules of law which conflict with this Court's decision in *Heller* and are, therefore, wrong. The first, which had unfortunately already been followed by other district courts, holds that the possession of short-barreled shotguns and machine guns are never protected by the Second Amendment, regardless of the lawful purpose which they serve. This flawed *ipso facto* analysis violates the holding in *Heller* that the possession of operational handguns is privileged under the Second

Amendment not because of the safe nature of loaded firearms kept in a home, but because of the context in that case and the reasonable relationship of having loaded firearms with Mr. Heller's lawful purpose: personal and home defense.

The Court of Appeals second egregious misstatement of the of law is its holding that only members of a governmental militia enjoy Second Amendment protections. Given that Mr. Heller had no membership in any military organization, governmental or otherwise, this ruling is flatly in conflict with *Heller*. Accordingly, the petitioner urges the Court to grant the Petition For Writ of *Certiorari* to the United States Court of Appeals for the Eighth Circuit.

DATED this 24th of December, 2008.

Respectfully submitted,

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United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 07-2514
No. 07-2888

United States of America,	*	
	*	
Appellee,	*	Appeals from the United
	*	States District Court
v.	*	for the Western District
	*	of Arkansas
Hollis Wayne Fincher,	*	
	*	
Appellant.	*	

Submitted: March 10, 2008
Filed: August 13, 2008

Before WOLLMAN, BOWMAN, and MELLOY, Circuit Judges.

WOLLMAN, Circuit Judge.

Hollis Wayne Fincher was convicted by a jury on one count of possession of a machine gun, in violation of 18 U.S.C. §§ 922(o), 924(a)(2), and one count of possession of an unregistered sawed-off shotgun, in violation of 26 U.S.C. §§ 5841, 5861(d), and 5871. Fincher does not dispute that he possessed these guns or that he did so without a license. He appeals his conviction, however, arguing that he has the right

to possess these weapons under the Second Amendment of the United States Constitution because his possession has some reasonable relationship to the maintenance of a well regulated militia. Fincher also challenges the district court's determination that he is not eligible for court appointed counsel and challenges the district court's request to resentence him. We affirm the conviction and remand the issue of Fincher's eligibility for court appointed counsel to the district court for further inquiry.

I. Second Amendment

A. Background

Before Fincher's trial began, the government became aware of Fincher's intention to argue to the jury that his possession of guns was protected under the Second Amendment. Because that issue is a matter of law, the government filed a motion in limine asking the district court to prevent Fincher from arguing matters of law to the jury. After hearing oral argument on the motion, the district court granted the motion in part and denied it in part. In doing so, the district court stated that matters of law are "quintessentially within the province of the judge and not matters to be addressed to the jury." Nevertheless, the district court stated that it would allow Fincher to present evidence outside the presence of the jury that under *United States v. Miller,* 307 U.S. 174 (1939), and *United States v. Hale,* 978 F.2d 1016

(8th Cir. 1992), his possession of the guns was reasonably related to a well regulated militia.

At the close of the government's case, Fincher moved for judgment of acquittal. The district court denied the motion, stating that it was based on an attack on the law and not the evidence, and that under *Hale*, 978 F.2d 1016, the fact that a particular weapon may be susceptible to military use does not by itself establish a Second Amendment right to possess the weapon.

During his case-in-chief, Fincher presented his own testimony, which the district court heard in camera. Fincher testified that he possessed the guns as part of his membership in the Washington County Militia ("WCM"), an organization he helped found in 1994. He testified that the purpose of the WCM is to ensure the militia can operate as effectively militarily as possible in a time of state emergency and that the WCM has regular meetings and training sessions for its members. Fincher testified that between seven and nine individuals attend any given meeting of the WCM, though it is not always the same individuals in attendance. The WCM does not maintain a roster of its members or an inventory of weapons.

The WCM is not a secret organization. In fact, along with the other members of the WCM, Fincher wrote and sent letters to federal agencies via certified mail informing them of the WCM's existence and attempting to put them on notice that the WCM was lawful under state law. Fincher also sent at least one

letter to the governor of Arkansas, informing him about the WCM, seeking approval, and stating that the governor's failure to object to the WCM's declaration would provide affirmation that the state of Arkansas did not object to the WCM. Fincher denied receiving a letter from the governor stating that the state records did not contain any reference to the WCM and that no such organization was registered with, or sanctioned by, the office of the governor or the state of Arkansas.

In addition to sending written notice of the WCM to various governmental offices, Fincher invited local sheriffs to view the WCM facilities and weapons. Fincher also told state officials that the WCM possessed machine guns, which the public could observe at any one of the three annual picnics sponsored by the WCM, and he showed the machine guns to at least one sheriff. Fincher also testified about how the weapons used by the WCM were chosen and stored, some at the WCM facility and others at the individual members' residences.

When asked about the procedures for activating the WCM in the case of an emergency, Fincher stated that if an emergency occurred while he was the commander of the WCM, he would contact "the sheriff if – if I was able, you know, depending on the emergency, or the governor, or probably any other – or maybe the mayor of a city or any – anyone or no one. If there was an emergency that had to be taken care of, we have the right to preserve life, liberty, and pursuit of happiness. We have the duty to. You don't

stand around and wait for someone to tell you you can protect your life or perform emergency medical assistance or put out a fire. These are natural offices of the people." He also testified that the state could call up the militia at any point, and that even though the written notices that WCM sent to various governmental offices did not contain any phone numbers or other direct contact information, the governor would know how to contact them.

The district court ruled that Fincher's proffered testimony would not be admitted because the WCM, despite its attempts to receive state recognition, was an unorganized and unregulated militia and therefore, as a matter of law, did not fall within the auspices of the Second Amendment. The district court also noted that even if the WCM was a state-sponsored or state-connected militia, there was no evidence that the person in charge of that militia would determine that possession of machine guns or sawed-off shotguns was necessary to the preservation of a well regulated militia.

B. Discussion

Fincher asserts that the district court erred by not allowing the jury to determine whether his possession of firearms was reasonably related to a well regulated militia and therefore protected by the Second Amendment. We review a district court's grant of a motion in limine for abuse of discretion, *Robinson v. Potter,* 453 F.3d 990, 995 (8th Cir. 2006),

and we accord it great deference on evidentiary rulings such as the admissibility of proffered testimony, *United States v. Wilson,* 103 F.3d 1402, 1406 (8th Cir. 1997). We review *de novo* the district court's legal conclusions, such as whether possession of firearms in relation to membership in a non-state-sponsored militia is protected by the Second Amendment. *United States v. Lippman,* 369 F.3d 1039, 1043 (8th Cir. 2004).

The role of the jury is to decide facts, not legal issues. *United States v. Peck,* 161 F.3d 1171, 1174 (8th Cir. 1998). Accordingly, the district court did not err in prohibiting Fincher from arguing or presenting evidence regarding a question of law to the jury.

We turn to the question whether the district court erred by concluding that Fincher's possession of the guns did not fall within the protection of the Second Amendment. We conclude that the district court's determination that the WCM was not affiliated with the state militia and therefore not subject to the protections of the Second Amendment under *Miller* and *Hale* is well supported by the record.

Fincher contends that our decision in *Hale,* 978 F.2d 1016, established an affirmative defense to the charge of unlawful possession of firearms. In *Hale,* we stated that the possession of firearms is not protected unless the possession bears a reasonable relationship to a well regulated militia. 978 F.2d at 1020; *see also United States v. Pfeifer,* 371 F.3d 430, 438 (8th Cir. 2004) (citing *Hale*); *United States v. Farrell,* 69 F.3d

891, 894 (8th Cir. 1995) (same). Although the WCM is not a secretive organization and has held relatively regular training sessions and meetings over the years, we stated in *Hale* that "'[t]echnical' membership in a state militia (e.g., membership in an 'unorganized' state militia) or membership in a non-governmental military organization is not sufficient to satisfy the 'reasonable relationship' test." *Hale*, 978 F.2d at 1020 (citing *United States v. Oakes*, 564 F.2d 384, 387 (10th Cir. 1977)). In Arkansas, the state militia is defined as:

> (a) The militia shall be divided into two (2) parts: the organized, consisting of the active and inactive Army National Guard and Air National Guard; and *the unorganized, consisting of all those persons of the militia not in the active or inactive Army National Guard or the Air National Guard.*
>
> (b) The militia shall consist of all able-bodied male residents of the state between the ages of seventeen (17) and forty-five (45) years who are, or intend to become, citizens of the United States, unless exempt by law, together with all other acceptable volunteers, waiving necessary requirements.

Ark. Code. Ann. § 12-61-101 (emphasis added). Thus, despite WCM's attempts to contact the governor's office and become an organized state militia, the district court correctly concluded that Fincher's testimony, even if believed by the jury, would not support his Second Amendment argument because

Fincher is not a member of an organized state militia. Rather, Fincher's testimony established that the WCM was an "unorganized" militia because it is not the Army National Guard or the Air National Guard and is not formally connected with the state of Arkansas. Therefore, under *Hale,* Fincher's possession of firearms is, as a matter of law, not reasonably related to a well regulated militia and is thus not protected by the Second Amendment.

In reaching this conclusion, we have taken into account the Supreme Court's recent decision in *District of Columbia v. Heller,* 128 S. Ct. 2783 (2008),[1] in which the Court held that the District of Columbia's complete prohibition on the possession of usable handguns in one's home violated the Second Amendment. *Id.* at 2817-18. In holding that the Second Amendment guarantees "the individual right to possess and carry weapons in case of confrontation," *Id.* at 2797,[2] the Court also stated that the right to possess firearms is not beyond the reach of all government regulation. *Id.* at 2799, 2816 ("Like most

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[1] At trial, Fincher's Second Amendment argument focused on his claim of right to possess the guns because they are military weapons and he is a member of the militia and not a claim of an individual right to possess a machine gun or unregistered sawed-off shotgun. Nevertheless, we think it is clear that even if Fincher had made the latter argument at trial, his possession of the guns is not protected under *Heller.*

[2] We note that the Supreme Court did not address the question whether the Second Amendment is incorporated through the Fourteenth Amendment and thus applicable to the states.

rights, the right secured by the Second Amendment is not unlimited. From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.").

In discussing the limitations the government can place on an individual's right to possess firearms, the Court noted that *Miller* does not protect "weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns." *Heller,* 128 S. Ct. at 2815-16. The Court also articulated a nonexclusive list of what it viewed to be acceptable government regulation of firearms:

> [T]he majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues. Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms. We also recognize another important limitation on the right to keep and carry arms. *Miller* said, as we have explained, that the sorts of weapons protected were those "in

> common use at the time." We think that limitation is fairly supported by the historical tradition of prohibiting the carrying of "dangerous and unusual weapons."

Id. at 2816-17 (internal citations and footnote omitted).

Accordingly, under *Heller,* Fincher's possession of the guns is not protected by the Second Amendment. Machine guns are not in common use by law-abiding citizens for lawful purposes and therefore fall within the category of dangerous and unusual weapons that the government can prohibit for individual use. Furthermore, Fincher has not directly attacked the federal registration requirements on firearms, and we doubt that any such attack would succeed in light of *Heller.* Accordingly, because Fincher's possession of guns is not protected by the Second Amendment, the district court did not abuse its discretion in preventing him from arguing otherwise to the jury.

II. Court Appointed Counsel

A. Background

The circumstances surrounding Fincher's court appointed counsel are fully recited in the district court's order, *United States v. Fincher,* No. 06-50064-001, 2007 WL 2177062 (W.D. Ark. July 27, 2007), and are largely undisputed by Fincher. For the purpose of our analysis, we will highlight the main facts.

Fincher was arrested on November 9, 2006, for violating 18 U.S.C. § 922(o). When he made his initial appearance later that day, he requested the appointment of an attorney because of his financial inability to retain counsel. He executed a "Financial Affidavit In Support of Request For Attorney or Other Court Services Without Payment Of Fee" ("the financial affidavit"), which indicated that he had no personal income, that his wife made $10.50 an hour, that he had $2,000 in savings, that he owned two vehicles of unknown value, one on which he was still making payments, and that he owned his home and 120 acres of real estate in Fayetteville, Arkansas, which had unknown value. Based upon that information, the district court appointed counsel to represent Fincher pursuant to the Criminal Justice Act.

On December 13, 2006, Fincher's appointed counsel withdrew because Fincher had retained other counsel. Thereafter, Fincher was convicted on both counts charged in the indictment. On March 8, 2007, Fincher informed the district court that he no longer had counsel and requested that counsel be appointed for him, which was done.

Before Fincher was sentenced, he executed a quitclaim deed conveying the 120 acres of real estate to his daughters in exchange for consideration of "One dollar ($1.00) and other good and valuable consideration," and reserving a life estate in the property for himself and his wife. Thereafter, the district court imposed concurrent sentences of 78 months' imprisonment on each count. Fincher was

also subject to a fine of up to $250,000. Although the guidelines range called for a fine of between $12,500 and $125,000, the district court imposed a fine of only $1,000 under the belief that Fincher had no significant assets.

After sentencing, Fincher requested release on bond pending appeal. The district court conducted a hearing on the matter and agreed that Fincher could be released on $100,000 bond. Fincher indicated that he could not post bond in that amount. The district court noted that Fincher might be able to use his real estate to secure the bond, whereupon Fincher's daughters executed a mortgage for that purpose. As a result, the district court became aware that Fincher's property had significant value, and that Fincher had conveyed it to his daughters.

As a result of these circumstances, on July 3, 2007, the district court held an evidentiary hearing to determine Fincher's financial eligibility for court appointed counsel. The district court received testimony from Fincher, his wife, and his two daughters. The district court also requested that Fincher provide supporting documents, such as his contract with retained counsel and the deed transferring the real estate. In addition, the district court ordered an independent appraisal of the property, which estimated that it had a value of $455,000.

On July 27, 2007, the district court entered an order stating that Fincher "is not now, nor has he ever been at any time material to this proceeding,

financially unable to obtain counsel to represent him in this proceeding and that appointments of counsel for him were improvidently made." *Fincher,* 2007 WL 2177062, at *10. Accordingly, the district court ordered Fincher to reimburse the United States Treasury $8,357.55 for the legal services provided to him by the attorneys appointed under the Criminal Justice Act. *Id.*

B. Discussion

Fincher asserts that the district court's July 27, 2007, order revoking his eligibility for court appointed counsel should be reversed because he did not misrepresent the value of his real estate when he stated that the value was unknown. He also challenges the appraised value of the property and the district court's conclusion that he owns the property free and clear. Fincher asserts that he was subjectively unaware of the value of the property when he filled out the affidavit, that the property is not worth nearly as much as the appraised value because it is landlocked, and that he owned it as a joint tenant with his wife. Fincher further contends that the transfer of the property to his daughters was legitimate because he informed the Assistant United States Attorney who was working on the case about the transfer.

The Criminal Justice Act provides a framework for ensuring that individuals who are financially unable to afford defense counsel are provided counsel

as required by the Sixth Amendment. *United States v. Brockman,* 183 F.3d 891, 897 (8th Cir. 1999). The Act requires that each United States district court create "a plan for furnishing representation for any person financially unable to obtain adequate representation. . . ." 18 U.S.C. § 3006A(a). A person is eligible for court appointed counsel if, after the United States magistrate judge or court conducts an "appropriate inquiry," the court is satisfied that "the person is financially unable to obtain counsel." 18 U.S.C. § 3006A(b). Financial inability to obtain counsel is not the same as being indigent or destitute, but the defendant has the burden of establishing that he or she is financially unable to obtain counsel. *Brockman,* 183 F.3d at 897; *Museitef v. United States,* 131 F.3d 714, 716 (8th Cir. 1997). "If at any time after the appointment of counsel the United States magistrate judge or the court finds that the person is financially able to obtain counsel or to make partial payment for the representation, it may terminate the appointment of counsel or authorize payment as provided in subsection (f), as the interests of justice may dictate." 18 U.S.C. § 3006A(c); *see also* 18 U.S.C. § 3006A(f) ("Whenever the United States magistrate judge or the court finds that funds are available for payment from or on behalf of a person furnished representation, it may authorize or direct that such funds be paid. . . ."); *Museitef,* 131 F.3d at 715.

Thus, our review of the district court's determination of financial eligibility for court appointed counsel is a three-step process. *See United States v.*

Parker, 439 F.3d 81, 92 (2d Cir. 2006) (reviewing district court's mid-case appointment of counsel). We must ask, (1) whether the district court conducted an "appropriate inquiry" into the defendant's financial eligibility, (2) whether the district court correctly determined the defendant's financial eligibility, and (3) whether the district court erred when it weighed the "interests of justice." *Id.* at 92-93. Because we ultimately remand this issue to the district court for further review, we reach only the first of these three questions.

To determine a defendant's financial eligibility, the district court should make a "full inquiry" into the defendant's actual ability to retain counsel. *Museitef*, 131 F.3d at 716. A full-scale adversarial hearing is not required, however, before a district court may order repayment of attorney's fees under the Criminal Justice Act. *United States v. Vale*, 140 Fed. Appx. 302, 303 (2d Cir. 2005) (unpublished opinion) (citing *United States v. Crosby*, 602 F.2d 24, 28 (2d Cir. 1979)); *see also Parker*, 439 F.3d at 93 ("The task necessarily varies with the circumstances presented, and no one method or combination of methods is required." (internal quotation omitted)). We review *de novo* the adequacy of the district court's inquiry. *Parker*, 439 F.3d at 93 n.12.

In this case, the district court's initial inquiry was based upon the financial affidavit submitted by Fincher. *See id.* at 93 (noting that in some cases the court's inquiry may be limited to the defendant's statements on the financial affidavit). Based upon the

limited information available at that time, the district court did not err in appointing counsel for Fincher. *Brockman,* 183 F.3d at 897 (any doubt about the defendant's eligibility for court appointed counsel should be resolved in the defendant's favor); *United States v. Cohen,* 419 F.2d 1124, 1127 (8th Cir. 1969) (district court's determination that defendant was ineligible for court appointed counsel based upon the ownership of real estate with an unknown value and without a more searching inquiry was error).

Although a district court should investigate information contained in an affidavit when the information provided renders the defendant's eligibility questionable, the district court's initial determination of eligibility can be amended when new information comes to light. *See In re Boston Herald, Inc.,* 321 F.3d 174, 179 (1st Cir. 2003) (erroneous eligibility determinations can be corrected at a later time). In this case, the district court became aware of the fact that Fincher's property had significant value when it was mortgaged to secure Fincher's $100,000 bond and Fincher testified that he knew that property in the same area had recently sold for between $2,000 and $4,000 an acre. This new information was sufficient to warrant a reexamination of Fincher's eligibility.[3]

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[3] In its July 27, 2007, order, the district court noted that it should have conducted a [sic] investigation beyond Fincher's financial affidavit before it initially appointed him counsel. *Fincher,* 2007 WL 2177062, at *7. Nevertheless, the district court reasoned that the defendant has the burden of establishing

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Fincher argues that the district court erred in determining that he was not eligible for court appointed counsel because the district court did not take into consideration the fact that the property is landlocked and therefore is not as valuable as the appraisal indicates. Fincher testified at the hearing, however, that the property is located one mile off a public road and that there is an unpaved road that goes directly to the property. Fincher also informed the district court that the property has a right-of-way that, although not currently used, is attached to ownership of the property. Furthermore, it is undisputed that Fincher and his wife currently reside on the property, suggesting that the property is not in fact inaccessible. The appraisal acknowledges that any ingress and egress to the property would need to be improved, as the current road is not paved. Accordingly, we conclude that the district court did not err in accepting as accurate the appraiser's opinion that the property had a value of $455,000, which falls within Fincher's estimate that the property is worth between $2,000 and $4,000 an acre.

Fincher argues for the first time on appeal that because he owned the property as a joint tenant with

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financial eligibility for court appointed counsel and that Fincher did not meet this burden and in fact misrepresented his financial eligibility by listing the 120 acres as having an unknown value when, in fact, he knew that real estate in the same area had recently sold for between $2,000 and $4,000 an acre. *See id.* (citing *United States v. Lefkowitz*, 125 F.3d 608 (8th Cir. 1997)).

his wife, he did not own it free and clear, and that the district court therefore erred by concluding otherwise. This late-raised assertion is directly contradicted, however, by the testimony of Fincher's daughter, who testified that Fincher's name is the sole one on the title. Furthermore, Fincher's wife testified that she did not know if she had ever been deeded any portion of the property. Although the quit claim deed that transferred the property to Fincher's daughters in early 2007 recites that Fincher and his wife each owned an undivided one-half interest in the property as tenants in common, there is no evidence in the record that Fincher and his wife owned the property as joint tenants. Accordingly, the district court did not err when it found that Fincher owned the property free and clear because Fincher has not established that there are any mortgages or liens on the property.

Regarding Fincher's transfer of the property to his daughters via quit claim deed, we conclude that Fincher's letter to the Assistant United States Attorney regarding the transfer of the property does not insulate the transfer from later question. Testimony at the evidentiary hearing from Fincher, his wife, and his two daughters, as well as the letter sent to the AUSA, all indicate that the property was transferred after Fincher's conviction to avoid the possibility of the property being sold to pay any fine imposed by the district court as part of Fincher's sentence. Accordingly, the district court did not err in concluding that the attempted transfer of the property should be

considered when determining Fincher's eligibility for court appointed counsel.

Despite these conclusions and the fact that the district court conducted a more thorough inquiry into Fincher's eligibility in July 2007 than it did initially, the district court's analysis leaves factual questions unanswered. Thus, we remand this issue to the district court for further consideration of whether Fincher's wife has any ownership in the property and, if so, whether that affects Fincher's ownership of the property or the application of the Arkansas Homestead Exemption. Specifically, the district court must consider whether the entire 120 acres of real estate is protected by the Homestead Exemption, making Fincher eligible for court appointed counsel despite his ownership of the property, or whether the exemption protects only a portion of the real estate. *See* Ark. Code Ann. § 16-66-210; *see also United States v. Trevino,* 679 F. Supp. 636, 636 (S.D. Tex. 1987) (doubting that defendants should have to sell their homestead to appeal criminal conviction); *Perry v. Chief of Police of City of Marianna, Ark.,* 660 F. Supp. 1546, 1552 (E.D. Ark. 1987) (in determining indigency, defendant should not be required to sell his inexpensive car or his home).[4] Additionally, the

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[4] Generally, cases in which a defendant's ineligibility for court appointed counsel has been affirmed are based upon the defendant's income and cash flow, not a requirement that the defendant sell his homestead to facilitate the payment of defense costs. *See, e.g., Lefkowitz,* 125 F.3d at 621 (defendant had recently spent several hundred thousand dollars on other

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district court should consider whether Fincher has the current ability to reimburse the United States Treasury for the legal services he received in light of the transfer of the real estate to Fincher's daughters.

III. IFP Status on Appeal

We turn next to Fincher's request for *in forma pauperis* ("*IFP*") status on appeal. Because we remand to the district court for further review the issue of Fincher's eligibility for court appointed counsel, we do not reach this issue. Nevertheless, Fincher's IFP status on appeal is dependent upon his eligibility for court appointed counsel at the trial level. If the district court concludes that Fincher is eligible for court appointed counsel and therefore should not be required to reimburse the cost of the legal services he received, and Fincher's financial circumstances do not change between the time of the district court and the appellate court proceedings, he should be granted IFP status on appeal. *See United States v. Danielson,* 325 F.3d 1054, 1077 (9th Cir. 2003) (court appointed

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attorney's fees and personal expenses and district court found defendant's own testimony of indigence to be lacking credibility); *United States v. Harris,* 707 F.2d 653, 661 (2d Cir. 1983) (district court found that defendant had "substantial income" in the past two years and might have had other undisclosed income); *United States v. Wetzel,* 488 F.2d 153, 157 (8th Cir. 1973) (affirming reimbursement order (for about $350) because defendant received $19,000 for the sale of cattle and owned real estate (the opinion provides no indication that the real estate was defendant's homestead)).

counsel continues on appeal unless defendant's financial situation changes and he or she is no longer financially eligible).

IV. Sentencing

On the basis of its conclusion that Fincher misrepresented his financial eligibility for court appointed counsel, the district court seeks a remand for resentencing. In light of our conclusion that the district court must conduct a more searching inquiry into Fincher's eligibility for court appointed counsel, we decline the request for remand. Moreover, it is questionable whether we have jurisdiction to remand in the absence of an appeal or cross-appeal from the government, or whether the district court has jurisdiction to resentence a defendant in the absence of statutory authority to do so. *See Greenlaw v. United States,* No. 07-330, 2008 WL 2484861 (U.S. June 23, 2008) (holding that a circuit court cannot increase a defendant's sentence without a government appeal or cross-appeal); *United States v. Ross,* 245 F.3d 577, 585-86 (6th Cir. 2001) (district court may not resentence defendant without statutory authority); *see also United States v. Sadler,* 234 F.3d 368, 373-74 (8th Cir. 2000) (a district court's "change of heart as to the appropriateness of the sentence, rather than a correction in the application of the guidelines," is not the type of "clear error" that can be corrected under Rule 35(c) (internal quotation and citation omitted)); *cf. United States v. Fortino,* No. 07-3476, 2008 WL 2388893 (8th Cir. June 13, 2008) (per curiam).

V. Conclusion

The conviction is affirmed. The order directing Fincher to reimburse the United States Treasury $8,357.55 for the legal services he received pursuant to the Criminal Justice Act is vacated and the case is remanded the district court for further proceedings consistent with the views set forth in this opinion.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 07-2514

United States,

Plaintiff-Appellee

v.

Hollis Wayne Fincher,

Defendant-Appellant

No: 07-2888

United States,

Plaintiff-Appellee

v.

Hollis Wayne Fincher,

Defendant-Appellant

Appeal from U.S. District Court for the Western
District of Arkansas – Fayetteville
(5:06-cr-50064-JLH-1)
(5:06-cr-50064-JLH-1)

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in part, vacated in part, and remanded to the district court for proceedings consistent with the opinion of this court.

August 13, 2008

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

UNITED STATES OF AMERICA **PLAINTIFF**

v. **Criminal No. 06-50064-001**

HOLLIS WAYNE FINCHER **DEFENDANT**

ORDER

(Filed July 27, 2007)

On July 3, 2007, the captioned case came on for evidentiary hearing with regard to questions about the financial status of defendant Hollis Wayne Fincher ("Fincher"), and his eligibility for appointment of counsel under the Criminal Justice Act. The background leading up to the Court's call for this hearing, the issues presented, and the Court's conclusions as to those issues, are set out in this Order.

1. Background:

Fincher was arrested on November 9, 2006, on a Warrant based on a Complaint charging him with possession of a machine gun in violation of **18 U.S.C. § 922(o)**. At his initial appearance on that date, Fincher executed a document entitled "Financial Affidavit In Support Of Request For Attorney Or Other Court Services Without Payment Of Fee" ("Financial Affidavit"). In the Financial Affidavit, Fincher indicated that he owned a home and 120

acres in Fayetteville, Arkansas (the "Property"), and gave the value of the Property as "unknown." No information as to liens against the Property was given.

The Financial Affidavit is part of the paperwork required under the Court's Criminal Justice Act Plan (the "Plan"), which is a "plan for furnishing representation for any person financially unable to obtain adequate representation" under **18 U.S.C. § 3006A**.

Pursuant to the Plan, legal representation is furnished at public expense to persons charged with felony crimes who are "financially eligible." The only purpose for completing the Financial Affidavit is to obtain legal representation and related services at public expense under the Plan.

On the basis of the Financial Affidavit, attorney David Dunagin ("Dunagin") was appointed to represent Fincher. Dunagin represented Fincher until December 13, 2006, when he was allowed to withdraw in favor of attorney Oscar Stilley ("Stilley"), who had been retained by Fincher.

Fincher's case was tried to a jury, and on January 12, 2007, he was convicted of both charges of a two-count Indictment, possession of a machine gun, in violation of **18 U.S.C. §§ 922(o)** and **924(a)(2)**, and possession of a sawed off shotgun not registered, in violation of **26 U.S.C. §§ 5841, 5861(d)** and **5871**.

On March 8, 2007, at Fincher's request, Stilley was allowed to withdraw and another attorney,

Shannon Blatt ("Blatt"), was appointed to represent Fincher.

A Presentence Investigation Report was prepared in connection with Fincher's sentencing. In the section entitled "Financial Condition: Ability to Pay," the Report stated that Fincher had "recently transferred" the Property to his two daughters, jointly, by quit claim deed executed on January 29, 2007, but that his wife continued to live on the Property.

On June 22, 2007, Fincher was sentenced to concurrent terms of 78 months imprisonment on each count of conviction. Although **18 U.S.C. § 3571** authorized a fine of up to $250,000, and the Guidelines suggested a fine range of $12,500 to $125,000, the Court – acting under the belief that Fincher had no significant assets – imposed a fine of only $1,000.

Following sentencing, Fincher moved for release on bond pending a designation of the Bureau of Prisons facility where he will serve his sentence, and for release on bond pending appeal.

The Court conducted a hearing on the release request and ultimately agreed – with no objection by the government – that Fincher could be released on $100,000 bond pending his designation.[1]

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[1] The motion for bond on appeal was taken up after it ripened with the filing of Fincher's Notice Of Appeal was filed, and denied on June 29, 2007.

Fincher indicated his inability to post bond in that amount, whereupon it was noted by the Court that the Property might be used to secure the bond. Fincher protested that he no longer owned the Property and expressed his fears that the Property might be lost if it were to be pledged to secure a bond. The Court assured Fincher that if he complied with the conditions imposed upon him, the Property would be in no danger of being lost. Fincher and his daughters then agreed to pledge the Property to secure the $100,000 bond.

In connection with preparing the paperwork pledging the Property to secure the bond, the Court became aware that when Fincher quitclaimed the Property to his daughters, he received essentially no consideration for it,[2] and that he had reserved life estates in the Property to himself and his wife. This awareness prompted the Court to, for the first time, carefully examine Fincher's Financial Affidavit and the deed of conveyance whereby he transferred title to the Property to his daughters.

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[2] The Quit Claim Deed recites consideration of "One Dollar ($1.00) and other good and valuable consideration."

2. The substantive issues presented:

The foregoing series of events presented three issues:

* First, it called into question the veracity of the Financial Affidavit and, consequently, Fincher's eligibility for services under the Plan. If, at the time Fincher executed the Financial Affidavit, the Property had significant value, it would be most unlikely that Fincher qualified for appointment of counsel under § **3006A**. In addition, the conveyance of the Property would not necessarily make him so qualified.

* Second, it called into question the basis – in part – of the sentence that had been pronounced. The Court had varied from the Guidelines, and significantly reduced the fine imposed on Fincher, based on its understanding that Fincher was financially unable to pay a fine.

* Finally, the Court had accepted a mortgage on the Property to secure Fincher's bond in the sum of $100,000 for release pending the designation of the Bureau of Prisons facility where he will serve his sentence.

These circumstances – all coming into focus at the conclusion of Fincher's sentencing – obliged the Court to further investigate Fincher's financial condition, most particularly the value of the Property and the circumstances of its conveyance. An evidentiary hearing was conducted on July 3, 2007, and the Court

thereafter obtained the services of Tom Reed, of Reed & Associates, Inc., to prepare a professional appraisal of the Property. The report of that appraisal has now been submitted, and this matter is ripe for decision.

3. The jurisdictional issue:

Initially, it is necessary to consider and determine whether this Court has jurisdiction to resolve the issues presented, given that Fincher has filed a Notice Of Appeal. The general rule is that

> a federal district court and a federal court of appeals should not attempt to assert jurisdiction over a case simultaneously. The filing of a notice of appeal is an event of jurisdictional significance – it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal.

***Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982).**

Issues not before the appellate court may be considered by the district court during the pendency of an appeal, however. ***Harmon v. U.S. Through Farmers Home Administration*, 101 F.3d 574 (8th Cir. 1996).** Because there is no indication that either party has challenged Fincher's eligibility for appointment of counsel on appeal, the Court concludes that the rule in ***Griggs*** does not deprive it of jurisdiction to take up that issue.

The Court's concern about the fine imposed at sentencing presents a much closer question. The Eighth Circuit has said, citing ***Griggs***, that "while an appeal is pending, the district court may not reexamine or supplement the order being appealed." ***State ex rel. Nixon v. Coeur D'Alene Tribe*, 164 F.3d 1102 (8th Cir. 1999).** It has also held that a district court may not entertain a motion under **F.R.Cr.P. 35** during the pendency of an appeal, explaining that the rule in ***Griggs***

> serves two important interests. First, it promotes judicial economy for it spares a trial court from considering and ruling on questions that possibly will be mooted by the decision of the court of appeals. Second, it promotes fairness to the parties who might otherwise have to fight a confusing "two front war" for no good reason, avoiding possible duplication and confusion by allocating control between forums.

***U.S. v. Ledbetter*, 882 F.2d 1345, 1347 (8th Cir. 1989)** (internal citation omitted).

Given these statements of the law, the Court concludes that it has no jurisdiction to revisit Fincher's sentencing while the appeal is pending. Accordingly, it will leave that issue to the appellate court unless and until the matter is remanded to this Court.

4. The authority for appointment of counsel:

The authority for appointment of counsel in a criminal case is found in **18 U.S.C. § 3006A**, which states, in **§ 3006A(a)(1)**, that "[r]epresentation shall be provided for any financially eligible person who . . . is charged with a felony. . . ."

The term "financially eligible" is not defined in **§ 3006(A)**, but the corresponding term "financially unable to obtain counsel" is defined in the Plan, as follows:

> A person is "financially unable to obtain counsel" within the meaning of this Plan if his or her net financial resources and income are insufficient to enable him or her to obtain qualified counsel.

IV.B.1.

The concept is fleshed out in ***U.S. v. Brockman*, 183 F.3d 891 (1999)**:

> The Criminal Justice Act ("CJA") was passed by Congress in 1964 "to insure that defendants who are financially unable to afford trial services necessary to an adequate defense are provided them in accordance with the Sixth Amendment to the United States Constitution." Counsel must be appointed under the CJA if the court is satisfied after "appropriate inquiry" that the defendant is "financially unable to obtain counsel." When requesting the appointment of counsel, the burden is on the defendant to show that he is

> "financially unable" to afford representation. Financial inability to pay "is not the same as indigence or destitution," and doubts as to eligibility should be resolved in a defendant's favor.

183 F.3d at 897 (internal citations omitted).

5. The evidence regarding Fincher's financial status:

(a) During the evidentiary hearing on July 3, 2007, Fincher testified that, at the time of his initial appearance, he told the Magistrate Judge (or a member of her staff) that he wanted an attorney and that he had no money. He said he answered questions from a staffer about his financial status; that the staffer used that information to fill out the Financial Affidavit; and that he then signed the Financial Affidavit.

Fincher testified that he told the staffer that he owned 120 acres, and that property in the vicinity had sold for between $2,000 and $4,000 per acre. He further testified that he did not recall whether he told the staffer that the value of the Property was "unknown."

The Court does not credit Fincher's testimony that he mentioned to the staffer any per acre values for land sales in the vicinity of the Property, or his testimony that he does not recall telling her its value was unknown, for three reasons:

* First, the Court does not believe that the Magistrate Judge's staffer would have written that the value of the Property was "unknown" if Fincher had not told her that. If he did not tell the staffer the value was unknown, and did tell her that land in the area was selling for $2,000 to $4,000 per acre, she would have had every reason to inquire further about the value of the Property and no reason whatsoever – on her own initiative – to state that its value was "unknown."

* Second, Fincher signed the Financial Affidavit under penalty of perjury, and even wrote above his signature "I believe the info is true." Fincher testified at the hearing that he did not know what was on the Financial Affidavit when he signed it, because he did not have his reading glasses and could not see it. The Court does not believe that Fincher would have written in his own hand that the information in the affidavit was true if he did not know what was in the Financial Affidavit. Indeed, it would be misleading at best, and quite possibly dishonest, if he swore the information was true when he did not know its contents.

* Third, Fincher testified that he could not "morally" have mortgaged or sold the Property to pay for his defense, because it was family property to be handed down from generation to generation. He testified that the Property had no market value to him, because he would not sell it for any amount of money, and that he would "sit in jail" before he would sell it. It was clear throughout the evidentiary

hearing that Fincher never had any intention of mortgaging or selling any part of the Property to pay for his defense, and that he intended to obtain appointment of counsel to represent him at public expense.

For these reasons, the Court does not believe that Fincher told the staffer about comparable sales figures, and does believe that he told her the value of the Property was unknown.

The Court also concludes that Fincher was not truthful when he told the staffer that the value of the Property was "unknown." While the Court does not credit Fincher's testimony *that he told the staffer* he was aware of sales of property in the vicinity for between $2,000 and $4,000 per acre, his testimony indicates that he *was actually* aware of such sales. Based on those sales, he was also aware that his 120 acres might well be worth $240,000 to $480,000.[3] Reed's appraisal placed the market value of the Property at $455,000, thus confirming that Fincher actually had a very accurate notion of the value of the Property when he signed the Financial Affidavit.

From the foregoing, the Court concludes that the Financial Affidavit contained a material misrepresentation of fact, and that Fincher knew of the

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[3] Fincher testified that the Property was free and clear of any liens. Fincher inherited the land from his father, who had inherited it from his father, and Fincher has never mortgaged the Property.

misrepresentation when he signed the document with the intent of obtaining an appointed attorney.

The Court also concludes that at the time he signed the Financial Affidavit, Fincher did not qualify for appointment of counsel. It is clear – without the need for citation of authority on the proposition – that a person who owns, free and clear, real property worth nearly half a million dollars has "net financial resources" sufficient to enable him to obtain qualified counsel to represent him.

(b) On the basis of the Financial Affidavit, Dunagin was appointed to represent Fincher. However, as already noted, Fincher soon retained Stilley to represent him.[4] Fincher testified at the evidentiary hearing that he understood and expected Stilley would work on his behalf along with his appointed attorney, i.e., that he would have not one but two attorneys representing him. If the matter had proceeded in the way Fincher expected, one of these attorneys – Dunagin – would have been paid out of public funds based on Fincher's claim that he was unable to afford counsel; the other – Stilley – would have been paid on the basis of an agreement between

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[4] The fact that a defendant who has been found qualified for appointed counsel later retains counsel does not necessarily suggest that the initial appointment was in error. It is not uncommon for the family of a criminal defendant to raise funds to pay for retained counsel after counsel is appointed.

Fincher and Stilley (although the terms of that agreement were not then known to the Court).[5]

At the evidentiary hearing, the Court inquired of Fincher how Stilley came to represent him. Fincher's testimony on the subject was vague to the point of evasiveness. He testified that he signed two contracts with Stilley – one providing for a substantial retainer and hefty hourly fees and the other providing that Stilley would not press Fincher for payment, as long as he paid $10 per year.

At the Court's request, several days after the evidentiary hearing Fincher produced two documents relating to his contractual relationship with Stilley. One is a signed contract for legal services, dated December 4, 2006, in which Fincher agrees to pay Stilley a retainer of $25,000; an hourly fee of $295 (with lesser sums for work performed by clerks and "staff attorneys"); and a fee of $4,200 for any full day "involving an overnight stay away from the home of Attorney."

The second document is a cover letter from Stilley to Fincher, dated February 3, 2007. It purports to transmit for Fincher's "review and consideration" a contract which Fincher has not yet signed. In it,

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[5] Fincher's expectation that both Dunagin and Stilley would represent him was undone when Dunagin promptly moved to withdraw from the case upon Stilley's entry of appearance. This was the proper thing for Dunagin to do, and the motion was granted.

Stilley states that he wants Fincher "to have the opportunity to think about this as long as you like before you sign off on this agreement." It also states that Stilley has talked with someone who "said he would be providing some assistance with respect to contributions to your legal defense," and that:

> I told you that I would not oppress you in any way with respect to this contract. If there is an amount due in excess of contributions and other payments for your defense, if any, you can pay that out in whatever manner is convenient to you.
>
> The only thing that I would insist on is that you pay me some money each year. I will not inquire as to your finances or try to require you to pay more than you deem proper and fair. If you only pay $10 per year, that is your call. I would not take this case unless I was fully convinced that you are an honorable man who would likewise treat me in a fair and reasonable manner, and allow me to receive my fee if and when it can be done without depriving you or your wife of suitable sustenance.

While the these two documents raise more questions than they answer, they do make one thing clear: Fincher was not financially unable to obtain counsel to represent him in his criminal case, because he did so.

(c) After Fincher was convicted, and while he was awaiting sentencing – and facing the prospect of

a fine that could be as high as $250,000 – his family consulted attorney Jack Butt ("Butt") about the preparation of a deed conveying the Property to the Finchers' two daughters, Carol Hale and Connie Fields. A Quit Claim Deed was prepared which accomplished this objective, but which retained in both Fincher and his wife a life estate in the Property. This Quit Claim Deed was executed on January 29, 2007.

At the evidentiary hearing, both the Finchers and their daughters denied that the prospect of the fine had anything whatsoever to do with the conveyance, but Fincher admitted that he wanted to get the property "out of my hands," and Fields admitted that the family had discussed the fact that if there was a fine and Fincher did not pay it, the Property could be taken to pay it.

Fincher also placed in evidence a letter from Butt to Assistant U.S. Attorney Chris Plumlee ("Plumlee"). The letter references a conversation between Butt and Plumlee that took place on February 6, 2007, about the fact that Fincher had been convicted; that he owned "a family farm in northwest Arkansas which has been in the family for many generations"; and that Butt had "been requested by the family to accomplish a transfer that would ensure its continued ownership by the family."

The testimony of Fincher and Fields, and the Butt letter, along with the close temporal coincidence of Fincher's conviction and the conveyance, are persuasive evidence that Fincher was trying to divest

himself of the Property so that it would be unavailable to pay any fine he might be sentenced to pay. This divestiture also had the effect of tending[6] to make Fincher appear less able to pay a lawyer after his conviction than he had been at his initial appearance.

(d) On March 6, 2007, Fincher wrote the Court a letter, in which he stated that he had "released Mr. Oscar Stilley from my service as my attorney because of irreconcilable differences," and that he did not "know how to carry on from here."

On March 8, 2007, the Court conducted a hearing with regard to this letter, at which Fincher stated that he was indigent. The Court finds this to have been a misrepresentation, and further finds that Fincher knew it was a misrepresentation, for the reasons set forth above. The Court, not realizing the true facts of the matter, appointed Blatt to represent Fincher.

(e) On May 9, 2007, Blatt filed a motion on behalf of Fincher, seeking production of a transcript at public expense for use at Fincher's sentencing. The motion stated that Fincher was "indigent and was

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[6] The Court uses the word "tending" advisedly, because it is persuaded that the Quit Claim Deed was probably a fraudulent conveyance as defined in A.C.A. § 4-59-204. The document purported to transfer Fincher's only substantial asset to his daughters, for no consideration, at a time when he was facing criminal penalties, yet allowed Fincher to retain possession of the asset.

appointed legal counsel and could not afford to hire an attorney." These representations of indigency were not accurate, for the reasons set forth above. The Court assigns no responsibility to Blatt for the inaccuracy of these representations – the Financial Affidavit was filed under seal before Blatt entered the case, and she played no part in the suspect conveyancing – but the fact is, Fincher was not indigent on May 9, 2007.

6. Based on the foregoing facts, the Court finds that Fincher was not eligible for appointment of counsel in November, 2006, nor at any time thereafter. The Court further finds that Fincher executed the Financial Affidavit and conveyed the Property to his daughters with the expectation and intention that he be perceived as financially unable to obtain counsel, when in fact he had net financial resources sufficient to enable him to obtain qualified counsel.

While the Court notes that further investigation should have been conducted on the issue of Fincher's financial status before either Dunagin or Blatt was appointed and that such investigation would have shown that he was not financially eligible for appointment of counsel, Fincher is not entitled to rely on or benefit from the fact that such an investigation was not made at an earlier time. It is not the responsibility of either the government or the Court to disprove entitlement to appointed counsel but, rather, it is the burden of a defendant who requests appointment of counsel to prove that he is unable to afford counsel. ***U.S. v. Lefkowitz*, 125 F.3d 608 (8th**

Cir. 1997). Not only did Fincher not carry this burden of proof, he misrepresented the state of his financial affairs, under penalty of perjury, for the purpose of obtaining appointed counsel without cost to him.

7. The remedy for legal services wrongfully obtained:

18 U.S.C. § 3006(A)(c) provides that

> [a] person for whom counsel is appointed shall be represented at every stage of the proceedings from his initial appearance before the United States magistrate judge or the court through appeal, including ancillary matters appropriate to the proceedings. If at any time after the appointment of counsel the United States magistrate judge or the court finds that the person is financially able to obtain counsel or to make partial payment for the representation, it may terminate the appointment of counsel or authorize payment as provided in subsection (f), as the interests of justice may dictate.

§ 3006(A)(f) provides that

> [w]henever the United States magistrate judge or the court finds that funds are available for payment from or on behalf of a person furnished representation, it may authorize or direct that such funds be paid to the appointed attorney, to the bar association or legal aid agency or community defender organization which provided the appointed attorney, . . . or to the court for deposit in the

> Treasury as a reimbursement to the appropriation, current at the time of payment, to carry out the provisions of this section.

Because the Court has concluded that Fincher has, at all times since his initial appearance in this matter, been financially able to obtain counsel, it finds that Fincher should be directed to pay into the Registry of the Court, for deposit in the Treasury as a reimbursement for the value of services received, the amounts paid to Dunagin and Blatt.

According to vouchers submitted by Dunagin and Blatt, Dunagin's charges came to $1,168.40, and Blatt's came to $7,189.15. The Court will, therefore, direct that Fincher pay into the United States Treasury the sum of $8,357.55 as reimbursement for those services.

8. The pending request for transcripts to be prepared at public expense:

Pending before the Court is a CJA 24 Authorization And Voucher For Payment Of Transcript, which requests the preparation – at public expense – of transcripts of all pre-trial, trial, sentencing, and post-trial proceedings in this case. Given its findings and conclusions herein, the Court declines to sign this CJA 24 Authorization And Voucher For Payment Of Transcript, and will leave Fincher to make his own arrangements for transcripts, or to petition the Court of Appeals for assistance in that regard.

9. Fincher's eligibility for appointed counsel on appeal:

Under **18 U.S.C. § 3006(A)(c)**,

> [a] person for whom counsel is appointed shall be represented at every stage of the proceedings from his initial appearance before the United States magistrate judge or the court through appeal, including ancillary matters appropriate to the proceedings.

As a result of this provision, it is the Court's understanding that Fincher is being represented by appointed counsel on appeal. His entitlement to appointment of counsel would not, under ordinary circumstances, be revisited at the appellate level.

The facts and circumstances outlined in this Order persuade the Court that Fincher is not entitled to appointed counsel on appeal, although it is not within this Court's jurisdiction to make a decision on that issue. The Court will, therefore, direct that a copy of this Order be forwarded to the Eighth Circuit Court of Appeals, for its consideration of whether Fincher is entitled to appointed counsel to prosecute his appeal in light of the findings herein.

10. The sentencing issue:

While the Court is precluded from revisiting the issue of Fincher's fine due to the pendency of his appeal, it is persuaded – based on the facts set forth in this Order – that Fincher's sentence should be vacated and he should be resentenced. The Court

feels strongly enough about the matter that it will take the unusual course of asking the Eighth Circuit Court of Appeals to remand the matter to this Court, so that it can vacate the sentence pronounced upon Fincher and resentence him in light of the true facts about his financial condition.

Four considerations impel this unusual course of action:

* First is the fact that the Court granted a significant downward variance as to Fincher's fine on the basis of its erroneous perception that he was unable to pay a fine within the Guidelines range. The Eighth Circuit has repeatedly held that a sentence may be unreasonable if it is outside of the range justified by the facts of the case. *See, e.g.*, ***U.S. v. Tjaden*, 473 F.3d 877 (8th Cir. 2007)**. The facts as now known are very different from those upon which the Court based Fincher's sentence, and the reduced fine to which Fincher was sentenced may not be justified in light of those facts. Given that the variance was based largely on faulty information supplied by Fincher, the Court believes that Fincher should be resentenced in light of accurate information.

* Second, vacatur at this point would promote a central tenet of Guidelines sentencing, the reduction of sentencing disparities. "The goal of the Sentencing Guidelines is . . . to reduce unjustified disparities and so reach toward the evenhandedness and neutrality that are the distinguishing marks of any principled system of justice." ***Koon v. U.S.*, 518 U.S. 81, 113**

(1996). While the Court obviously cannot say what sentence it might impose if it should be in a position to resentence Fincher, it is committed to the Guidelines goal that similarly-situated defendants should be treated similarly. This goal is thwarted when the Court bases a sentence on inaccurate information about a defendant's situation.

* Third, the justice system is damaged when it is gamed by a player such as Fincher. As stated in ***U.S. v. Bishop,* 774 F.2d 771, 776 (7th Cir. 1985)**, a "defendant's action in intentionally deceiving the court strikes at the very heart and foundation of the American system of justice." The system demands honesty from every participant, and it has not had that from Fincher with regard to his financial situation.

* Fourth, judicial and litigant efficiency will be served by allowing the Court to determine Fincher's sentence in light of the true facts prior to appeal, rather than awaiting the conclusion of appeal and possibly triggering a second appeal. Because courts have "the inherent power to correct judgments obtained through . . . intentional misrepresentation," ***Bishop, supra,*** citing ***Hazel-Atlas Glass Co. v. Hartford Empire Co.,* 322 U.S. 238 (1944)**, the Court will be able to take up the problems herein described upon the conclusion of Fincher's appeal[7]

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[7] The Court has considered the various obstacles to resentencing, and finds that they are overcome by the peculiar facts of

(Continued on following page)

(unless he is able to set aside his conviction), but postponing the matter until that time would certainly prolong these proceedings. The Court believes the better route would be to resolve the issue now, before appeal.

IT IS, THEREFORE, CONSIDERED, ORDERED AND ADJUDGED that Fincher is not now, nor has he ever been at any time material to this proceeding, financially unable to obtain counsel to represent him in this proceeding and that appointments of counsel for him were improvidently made.

IT IS THEREFORE ORDERED that Fincher is directed pay into the United States Treasury the sum of $8,357.55 as reimbursement for legal services provided to him by attorneys appointed under the Court's Criminal Justice Act Plan.

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this case. F.R.Cr.P. 35(a) does not apply, because it governs only correction of a "sentence that resulted from arithmetical, technical, or other clear error," rather than one which resulted from misrepresentations of the defendant.

The Constitutional prohibition against double jeopardy does not come into play, because a criminal sentence is not "accorded constitutional finality and conclusiveness similar to that which attaches to a jury's verdict of acquittal." *U.S. v. DiFrancesco*, 449 U.S. 117, 132 (1980).

Nor does Fincher have "legitimate expectations" in the finality of a sentence obtained through his own intentional misrepresentations. "A court must be able to sentence a defendant upon accurate information and when the sentence imposed is based upon fraudulent information provided by the defendant, the court has the inherent power to correct that sentence." *Bishop, supra*, 774 F.2d at 775.

IT IS FURTHER ORDERED that Fincher's request for transcripts at public expense for the purpose of his appeal is denied.

IT IS FURTHER ORDERED that the Clerk of Court furnish a copy of this Order to the Eighth Circuit Court of Appeals, for its consideration of

(a) whether Fincher is entitled to an appointed attorney to represent him on appeal; and

(b) whether it will grant this Court's request to remand this matter for vacatur of sentence and resentencing prior to appeal.

IT IS SO ORDERED, this 27th day of July, 2007.

/s/ Jimm Larry Hendren
JIMM LARRY HENDREN
UNITED STATES
DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 07-2514

United States,

Appellee

v.

Hollis Wayne Fincher,

Appellant

No: 07-2888

United States,

Appellee

v.

Hollis Wayne Fincher,

Appellant

Appeal from U.S. District Court for the Western District of Arkansas – Fayetteville
(5:06-cr-50064-JLH-1)
(5:06-cr-50064-JLH-1)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Neither Judge Smith nor Judge Shepherd participated in the consideration or decision of this matter.

September 25, 2008

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans